No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD M. PESKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 527 F. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. 31). A petition for rehearing with suggestion *en banc* was denied on March 8, 1976 (Pet. App. 32). On March 29, 1976, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 21, 1976 (Pet. App. 33), and the petition was filed on April 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence regarding use of interstate facilities was sufficient to prove violations of the Travel Act, 18 U.S.C. 1952.

2. Whether the trial court properly restricted cross-examination of government witnesses regarding prior unrelated instances of bribery unknown to petitioner when he committed the charged offenses.

3. Whether the trial court properly ruled that petitioner, if he elected to testify, could be cross-examined concerning other bribery activity in which he had been involved.

4. Whether the trial judge, by his remarks to the jury regarding further deliberations, coerced the jury to render a guilty verdict.

5. Whether the trial court's instructions required petitioner to prove his innocence.

6. Whether the trial judge erred in refusing to suppress voluntary statements made by petitioner to agents of the Internal Revenue Service during non-custodial questioning.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of using interstate facilities to promote an unlawful activity (18 U.S.C. 1952, "The Travel Act"), one count of conspiracy (18 U.S.C. 371), and one count of making a false statement on his income tax return (26 U.S.C. 7206(1)).[1] He was sentenced to concurrent three-year prison terms on each count. The court of appeals affirmed in a lengthy opinion (Pet. App. 1-30).

The evidence, which is set forth in detail in the opinion of the court of appeals, shows that petitioner, an attorney, was engaged to provide legal services to Kaufman & Broad, Inc. (K&B), a national corporation engaged in tract home building (Pet. App. 1, 2).[2] In March 1968, K&B, acting through petitioner, contracted to purchase a large tract of land in Hoffman Estates, Illinois,[3] contingent upon its being able to secure desired rezoning (Pet. App. 2). Petitioner's prosecution arose from his efforts to secure such rezoning through payments to various officials of Hoffman Estates.[4]

After preliminary discussions with several village officials, petitioner informed K&B vice-president Edward Stulberg that Mayor Roy Jenkins and Howard Noble wanted $25,000 to approve the rezoning (Pet. App. 2). At the time, there was considerable opposition to housing

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[1]He was acquitted on two other Travel Act counts and a tax charge.

[2]K&B was indicted with petitioner and pled guilty to charges arising from the incidents discussed herein.

[3]The land consisted of two parcels of 320 and 90 acres, respectively.

[4]To obtain a zoning change, K&B had to file a petition with the Zoning Board of Appeals, which would conduct a hearing and make

expansion in Hoffman Estates because of increased burdens on school resources (Tr. 50-51). In July or August 1968, petitioner visited Jenkins at the latter's store and told him that he hoped to secure approval of the zoning proposal as soon as possible (Tr. 552). During their conversation, petitioner used the term, "drop." Jenkins responded, "you mean money"; and petitioner replied, "[y]es" (Tr. 551). Jenkins then said that he was uncertain whether money would insure passage of the rezoning, but that he would talk to the other Board officials involved. Board members Pinger, Meyer, and Gibson subsequently told Jenkins that they would vote for rezoning in return for payment, and Jenkins told petitioner that he would try to secure the cooperation of other Board members as well (Tr. 556-560).

On September 26, 1968, Pinger, representing the Zoning Board of Appeals, recommended the rezoning to the Board of Trustees. The matter was tabled until October 10. On October 10, with Jenkins, Meyer, Gibson, and Cowin voting affirmatively, the motion passed (Tr. 564-565). Five days later, however, an ordinance embodying the zoning change was defeated with Cowin, Noble, Sloan and Franck voting against it (Pet. App. 2). Two more meetings between petitioner and various Board members ensued and on October 24, 1968, with K&B's Stulberg present, a motion to reconsider the October 15 action was passed (Pet. App. 3).

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a recommendation to the village's Board of Trustees. The Board then would conduct another hearing and make the ultimate decision whether the zoning change should be adopted (Tr. 76). If the zoning change was approved, the Trustees would adopt an ordinance embodying the change. Six village officials, Roy Jenkins, James Sloan, Howard Noble, Gerald Meyer, Herbert Gibson, and Edward Pinger, pleaded guilty to various charges arising from the rezoning activity.

After the October 24 meeting, petitioner told Jenkins that K&B would pay $35,000 when the rezoning was accomplished and another $35,000 during the construction period (Pet. App. 3).[5] Jenkins then told Pinger, Noble, Meyer, Gibson, and Sloan that time was running out on the K&B contract and that the company would pay $5,000 per person for favorable votes (Tr. 577-578, 827). On October 30, ordinances relating to the 320-acre parcel were passed, with Noble, Sloan, Gibson, and Meyer voting for them (Tr. 102, 578-579). On November 14, a favorable ordinance relating to the 90-acre parcel was passed, with the same parties voting affirmatively (Tr. 580). Between October 30 and November 30 petitioner gave Jenkins a package containing $35,000 in cash, which Jenkins divided among himself, Noble, Sloan, Meyer, Gibson, and Pinger (Tr. 580).[6]

The funds paid to the officials came directly from petitioner, who was to be reimbursed by K&B in the guise of legal fees. Petitioner received $10,000 on November 14, 1968; $25,000 on January 14, 1969; another $10,000 on February 25, 1969; and $55,000 on April 10, 1969 (Pet. App. 4).[7] The payments were made from a Chicago subsidiary of K&B account in Detroit (Pet. App. 6). The reimbursements from Detroit were necessary to give the Chicago subsidiary sufficient funds to cover the payments it made to petitioner (Pet. App. 6).[8] In addition, on

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[5]Jenkins also indicated a desire for a gas station site on the 90-acre parcel (Tr. 104-105).

[6]Since the officials involved were later defeated or did not seek reelection, the second $35,000 was not paid (Pet. App. 3-4).

[7]This sum was more than his $35,000 expenditure in order to compensate for his resultant higher tax liability and to cover his fee (Pet. App. 6).

[8]The sending of the four checks by K&B from Detroit to the Chicago subsidiary constituted four of the five Travel Act violations. The fifth was predicated upon Stulberg's trip from Detroit to Illinois

December 24, 1968, petitioner's partner, Deutsch, issued checks to two young lawyers, who cashed them, kept part of the proceeds for taxes, and remitted the balance to Deutsch. Deutsch testified that the purpose of this exchange was to generate cash for petitioner to pay village officials (Pet. App. 4).

ARGUMENT

1. Petitioner challenges the jurisdictional basis for his convictions on four counts under the Travel Act, 18 U.S.C. 1952, contending that the use of interstate facilities was too remote and that the illegal activity had concluded before passage of the relevant checks in interstate commerce. Petitioner does not contest his conviction on the fifth Travel Act count, for which he received an identical concurrent sentence. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.[9]

a. Petitioner contends that the payment of money from K&B's Detroit bank to its Illinois subsidiary, to replenish funds used to reimburse petitioner for his bribery payments, constituted too remote a use of interstate facilities to invoke jurisdiction under the Travel Act. But this scheme, involving the bribery of public officials by a large national corporation operating on a multistate level, was hardly a local operation to which the use of interstate facilities was fortuitous or incidental. To the contrary, petitioner was in constant contact with K&B officials in Detroit (see n. 10, *infra*), and K&B's ability to transfer funds from its

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to attend the October 24 meeting at which the Board voted to reconsider the zoning ordinances.

[9]In *Barnes*, this Court declined "as a discretionary matter," 412 U.S. at 848, n. 16, to consider petitioner's challenges to his convictions on four counts, after affirming his convictions on two counts for which he had received identical concurrent sentences.

Detroit headquarters to Illinois was vital to the execution of its corrupt plan. It does not matter that the interstate checks were not themselves used to pay the village officials, for petitioner obviously would not have spent his own funds without the contemplated reimbursement from K&B. Nor is it reasonable to claim, as petitioner does, that it was unimportant to the unlawful activity "when, how or even whether the bank account of the K&B subsidiary was replenished" (Pet. 16), for, as the court below found, the subsidiary could not have paid petitioner unless its account had been bolstered by funds from Michigan (Pet. App. 6).[10]

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[10]Petitioner also argues that he did not know of or foresee K&B's use of interstate facilities (Supplemental Petition for Certiorari). Certainly petitioner was not unaware of the interstate nature of K&B's business, for he knew that Stulberg operated from Detroit and often called him there (Tr. 30-36, 45, 73, 78, 83, 132-136, 141). While petitioner sent his bills to the local K&B office, they were addressed to Stulberg's attention. As the court of appeals noted: "[T]he interstate scope of the unlawful activity is clear, and was known to Peskin." Pet. App. 10. Furthermore, the plan to shift funds interstate was obviously known to K&B, petitioner's co-conspirator, and petitioner is chargeable with that knowledge. *Pinkerton* v. *United States*, 328 U.S. 640.

In any event, the circuits are in substantial agreement that knowledge of the use of interstate facilities is not an element of a Section 1952 offense. See *United States* v. *Doolittle*, 507 F. 2d 1368, 1372 (C.A. 5), affirmed *per curiam*, 518 F. 2d 500 (*en banc*); *United States* v. *LeFaivre*, 507 F. 2d 1288, 1297 (C.A. 4); *United States* v. *Hanon*, 428 F. 2d 101, 107-108 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Sellaro*, 514 F. 2d 114, 121 (C.A. 8), certiorari denied, 421 U.S. 1013; *United States* v. *Roselli*, 432 F. 2d 879, 890-893 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Colacurcio*, 499 F. 2d 1401, 1406 (C.A. 9); *United States* v. *Smaldone*, 485 F. 2d 1333, 1348, n. 10 (C.A. 10), certiorari denied, 416 U.S. 936. Cf. *United States* v. *Feola*, 420 U.S. 671. While the Sixth Circuit has taken a somewhat different view, *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S. 1040; *United States* v. *Prince*, 529 F. 2d 1108, even that circuit requires no more than reason to know about use of an interstate

There is no conflict within the Seventh Circuit or among the circuits on this issue. As the court of appeals noted (Pet. App. 8-9), "[t]he significance of the use of interstate facilities in this case differs markedly" from the significance in the other Seventh Circuit cases cited by petitioner. Thus, in *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), an extortion victim cashed a check and used the proceeds to pay off the perpetrators of the extortion. Interstate facilities were involved only because the victim's check was drawn on an out-of-state bank. Similarly, in *United States* v. *Isaacs*, 493 F. 2d 1124 (C.A. 7), a check drawn on a co-defendant's Illinois account to distribute bribery proceeds fortuitously happened to clear through the St. Louis Federal Reserve Bank. In neither case was the use of an out-of-state bank part of the illegal plan. The Second Circuit case relied on by petitioner (Pet. 15, 16), *United States* v. *Archer*, 486 F. 2d 670, also is beside the point. In *Archer*, officials investigating a local bribery operation purposely sent an undercover agent from New York to New Jersey in order to receive phone calls from the defendants and thus create federal jurisdiction. No such government-manufactured jurisdiction exists here.

b. Alternatively, petitioner contends that all illegal activity ceased before passage of the checks from the Detroit bank and that, consequently, he did not "thereafter" attempt to perform any acts within the meaning of 18 U.S.C. 1952. The court of appeals correctly rejected that contention in an opinion on which we rely (Pet. App. 11-12).

In brief, the court of appeals found that petitioner had agreed to make further payments as construction proceeded

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facility, a standard which is satisfied by the record here. Thus, there is no need in this case to resolve the apparent conflict between the circuits.

and also to transfer real estate. As the court noted (*ibid.*) petitioner continued to promote this unlawful activity after the checks were sent. He arranged, through his partner, to have two associates cash checks in December 1968, and return the funds to him in order, he claimed, to obtain cash needed for village officials. He also sought in 1971 to get K&B to transfer the real estate promised to Jenkins (*ibid.*).

The original bribery payments, and the payments to petitioner from Detroit, therefore were a necessary predicate to the success of the further bribery (Pet. App. 11). Far from being the final act in a limited plan, that series of payments was an intermediate step in a more comprehensive program. Also, the sending of each of the last three Detroit checks was an unlawful act occurring after the passage of any previous check. Thus, as the court of appeals pointed out (Pet. App. 12), petitioner's argument, even if meritorious, would be relevant only to Count 9.

2. Petitioner contends (Pet. 11-14) that rulings of the trial court regarding the limits of cross-examination, as well as certain instructions and remarks to the jury, deprived him of important constitutional rights. The court of appeals correctly ruled that these arguments, individually and collectively, are without merit.

a. The trial court permitted petitioner to cross-examine village officials about whether they had ever received money from others in return for favorable votes. Each responded that he had (Tr. 863-864, 915, 1044). Petitioner nonetheless contends that his cross-examination was improperly restricted because the trial court did not in addition permit him to probe the specific details of these other unrelated instances. Such details were necessary, petitioner argues, to establish his defense of coercion and to impeach the officials' credibility.

A trial judge necessarily has broad discretion to monitor the examination of witnesses, *Geders* v. *United States*, No. 74-5968, decided March 30, 1976, slip op. 6, especially regarding collateral matters. *United States* v. *Kirk*, 496 F. 2d 947 (C.A. 8). In this case the trial judge recognized that the credibility of the village officials was a proper subject for cross-examination but, once the prior acceptance of bribes had been established, declined to allow a sweeping inquiry into all the details of former transactions. That ruling was entirely proper. As the court of appeals noted (Pet. App. 22):

> At best for defendant, the probative value of these payments in other instances is open to question. As the Second Circuit recently observed: "Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not nonexistent, are at least exceedingly rare." *United States* v. *Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. denied*, 411 U.S. 982. Accordingly, evidence that the officials previously, or on this occasion demanded money carries little weight in a case such as this.

Since the officials did admit receiving prior payments, there is no merit to petitioner's suggestion (Pet. 7) that "the case went to the jury with the trustees still in the role of fallen angels."[11]

[11]The cases cited by petitioner are not on point. The evidence sought to be admitted in *Chambers* v. *Mississippi*, 410 U.S. 284, was not tangential but highly relevant, even crucial, to the central issue in that case. *Gordon* v. *United States*, 344 U.S. 414, and *United States* v. *Dickens*, 417 F. 2d 958 (C.A. 8), both involved rulings which totally blocked inquiry into a witness's motive for testifying. Here, the witnesses' credibility was already called into question by the testimony regarding prior bribes, and the district court could reasonably conclude that further collateral inquiry would be unlikely to produce material evidence.

The relevance of the sought-after testimony is made even more questionable by the fact that petitioner was unaware of any previous payments at the time he developed his bribery plans (Tr. 609-610). Since a claim of coercion challenges the element of intent embodied in the bribery offense, *United States* v. *Kahn*, 472 F. 2d 272 (C.A. 2), certiorari denied, 411 U.S. 982; *United States* v. *Barash*, 365 F. 2d 395 (C.A. 2); *United States* v. *Miller*, 340 F. 2d 421 (C.A. 4), it is difficult to see how petitioner's will could have been overborne in any way by events of which he had no knowledge. Furthermore, the purchase of land by K&B was expressly conditioned upon permission to rezone. Had the Board of Trustees refused to allow rezoning without a bribe, K&B would have been able to walk away from the purchase without further obligation and with no grave consequences to its business. Cf. *United States* v. *Kahn*, *supra*. Moreover, petitioner was not a principal of K&B, but its attorney; he thus had no interest that could have been subject to an effective extortionate threat.

b. Petitioner also challenges the trial court's advance ruling[12] that if he chose to testify, he would be subject to cross-examination about another bribe attempt in which he was personally involved. He argues that this decision intimidated him from testifying. The record shows that petitioner, while representing K&B in 1971, offered money to a public official to secure a sewage line to one of K&B's projects. The trial court reasoned that the government could properly disclose this other event to challenge any statement by petitioner on direct examination that he lacked the necessary intent to commit bribery.

No error inhered in this ruling. It is well established that evidence of similar acts is usually admissible to establish, among other matters, the element of intent.

[12]Petitioner sought the rulings prior to deciding whether to testify.

See, *e.g.*, Rule 404, Fed. R. Evid. Contrary to petitioner's suggestion of irrelevance, it would have been quite pertinent, had he claimed to have been an innocent victim, to show that he had offered the same type of bribe to another government agency, on behalf of the same client for the purpose of facilitating another building project. See *United States* v. *Koska*, 443 F. 2d 1167 (C.A. 2), certiorari denied, 404 U.S. 852.[13] The fact that the prospect of disclosure of this additional bribery bore upon petitioner's decision whether to testify simply reflects a tactical consideration properly imposed by the adversary system. "It is not thought overly harsh in such situations to require that the determination whether to waive the privilege [against testifying] take into account the matters which may be brought out on cross-examination." *McGautha* v. *California*, 402 U.S. 183, 215.

c. Petitioner also contends that the instructions on the extortion defense impermissibly shifted the burden of proof to him.[14] According to petitioner he was unable

[13]The cases cited by petitioner on this point involved matters of dubious relevance at best and are not apposite. *Boyd* v. *United States*, 142 U.S. 450, 458, held that earlier robberies by the defendant were not relevant for identification purposes to a later murder charged against the defendant. In *White* v. *United States*, 294 F. 2d 952 (C.A. 9), a drug possession and sale case, the court held inadmissible other drugs found on the patio of a house after the defendant had vacated the premises. In *United States* v. *Phillips*, 401 F. 2d 301 (C.A. 7), the court held that a prior offense for which the defendant was acquitted should not be admitted. In such cases, unlike the case here, the value of the evidence was slight and was far outweighed by the possible prejudicial effects.

[14]The instructions were as follows (Pet. App. 22-23):

> If you find that the public officials named in the indictment communicated a threat to the defendant that unless paid they would take action as public officials against Kaufman and Broad's zoning proposal, you may consider this in determining whether the defendant intended to commit bribery.
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> * * * * *
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> In determining whether the defendant was a victim of extortion, such as to negate his alleged criminal intent to bribe, it is relevant, but not controlling, whether Peskin or Jenkins first raised the question of money. Unless the extortion is so overpowering as to negate the criminal intent of wilfullness, it is not a total defense to bribery charges.

to rebut Jenkins' testimony that petitioner first raised the subject of money, since he elected not to testify. But the instructions on this issue did no more than inform the jury that it could consider whether petitioner or Jenkins first mentioned money and that, regardless of its conclusion on that question, the degree of coercion must be substantial before personal will is overborne. The instruction did not shift the burden of proving guilt away from the government, for the court repeatedly cautioned the jury that the prosecution must prove beyond a reasonable doubt all elements of the Section 1952 offenses, including bribery, and accordingly must show that petitioner intended to influence the officials (Tr. 1965-1966, 1883, 1888). Viewed in the context of the entire charge, *Cupp* v. *Naughten*, 414 U.S. 141, 147, the challenged instruction clearly did not shift the burden of proof.

d. Petitioner also attacks, as shifting the burden of proof, an instruction to the jury that "unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his [tax] return that he had knowledge of the contents of that return."[15] This charge was given in relation to the

[15]"A defendant's knowledge of the contents of the tax return may be inferred from the facts and circumstances of the case, and the signature at the bottom of the tax return is *prima facie*

tax evasion count of which petitioner was acquitted and not the false filing charge upon which conviction was returned. Although willfullness is also an element of the false statement count, other instructions on that count made clear that carelessness or inadvertence was a defense (Tr. 1897). The jury was also instructed that the government must prove beyond a reasonable doubt that the contents were materially false and that the signer knew they were false. Thus the jury instructions, considered as a whole, *Cupp* v. *Naughten, supra,* were not misleading or erroneous.[16]

e. Finally, petitioner argues that he was prejudiced because the trial judge supposedly "pressed" the jury for a verdict. The facts do not support that contention. After the jury had deliberated for two and one-half days, during which time it had been sequestered at night, the trial judge told counsel that he would allow the jury to deliberate until 10:00 p.m. that night. At that point he said that he would accept a verdict on any counts on which they had managed to agree or declare a mistrial if no agreement had been obtained. He did not make this decision known to the jury when they were brought to the court at 9:30 p.m., however, but merely asked them if they could reach a verdict by 10:00.[17]

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evidence that the signer knew the contents thereof, which is to say, that unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his respective return that he had knowledge of the contents of that return" (Tr. 1898).

[16]In any event, the inference is a reasonable one. Although the jury was not required to accept the inference, it would hardly be strained to infer that petitioner, a lawyer concerned with manipulating a complex bribery scheme, would make sure that his tax return reflected the covering transactions, which he had taken substantial trouble to devise.

[17]THE COURT: Please be seated, ladies and gentlemen. It has been a long day for you and I thought I better call you out at this late hour to ask you some questions. We have learned that Mr. Brown is the foreman. Mr. Brown, first it is important that you understand in any response to any of my questions are you to disclose how the Jury stands in any area where they are in disagreement; for or against, number, or anything of that sort. My first question is—and I gather that we all know the answer to this—have you yet reached a verdict as to all the counts in the indictment?

THE COURT: You have not. All right. Do you think that if you were allowed to deliberate, let's say, another half hour—and I don't intend to keep you in there any longer than that—you might reach a verdict as to all of the counts in the indictment?

FOREMAN BROWN: Yes.

THE COURT: You believe that you are close to a verdict on the complete indictment then?

FOREMAN BROWN: Possibly.

THE COURT: Now, let me ask all the members of the Jury, by a show of hands, to tell me, do you think it would be profitable and possible to reach a complete agreement on all counts of the indictment if you deliberated worthwhile to do that? Show of hands?

Well, we will do that then. If you will retire again, we will call you out again at 10:00 o'clock (Tr. 1938-1939).

Petitioner made no objection to this statement (Pet. App. 26). The jury then retired, and shortly thereafter announced a guilty verdict on five Travel Act counts and one tax count, and a not guilty verdict on two Travel Act counts and another tax count.

Since petitioner made no objection, reversal would be warranted only if the judge's statement constituted plain error. See Fed. R. Crim. P. 52(b). We submit that it could rarely, if ever, be plain error so long as the judge's statement is phrased neutrally, since such statements, to the extent they pressure a verdict, could as likely favor the defense as the prosecution. The failure of the defense

to object may thus properly be presumed to reflect a tactical decision to accept any effort to produce a verdict.

In any event, the judge did not tell the jury that it must reach a verdict,[18] but merely inquired if they were close to a verdict and could profitably spend another half-hour in deliberations. As the court of appeals noted, "the jurors may have reasonably interpreted his statement [to mean] that he would send them to their hotel rooms in preparation for another day's deliberations" (Pet. App. 27). This view, we submit, is fortified by the fact that, as the court below also noted, the trial court had twice previously cautioned the jury "that they should not surrender honest opinions as to the weight of the evidence 'for the mere purpose of returning a verdict' " (Pet. App. 27).

3. Petitioner also argues (Pet. 17-22) that a civil audit of his finances by the Internal Revenue Service was really a subterfuge for criminal investigation and that accordingly he should have been given *Miranda* warnings. The court below expressly found that the civil audit was not conducted disingenuously (Pet. App. 18-19).

In any event, petitioner was not entitled to *Miranda* warnings. As this Court held in *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, a suspect must receive *Miranda* warnings only when he is the subject of a custodial interrogation. That did not occur here.

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[18]Compare *Jenkins* v. *United States*, 380 U.S. 445, 446, where the trial judge told the jury that "[y]ou have got to reach a decision in this case."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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